PREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 27 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM— 1969

No. 217

SAMUEL S. STARR, MEYER WEINBERG and EDWIN FRADKIN,

Petitioners,

vs.

HYDROCARBON CHEMICALS, INC., and its subsidiaries; BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey corporations,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

CRUMMY, GIBBONS & O'NEILL,
Attorneys for Respondent, Elliott I. Clemence, Trustee,
11 Commerce Street,
Newark, New Jersey, 07102.

MICHAEL R. GRIFFINGER,
Of Counsel.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8011-12

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF THE CASE	1
ARGUMENT—The reasons set forth in the Petition for Writ of Certiorari are insufficient to justify granting the writ	2
CONCLUSION	7

Cases Cited

Milbank, Tweed & Hope v. McCue, 111 F. 2d 100 (4th Cir. 1940)	4
Rice v. Sioux City Cemetery, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955)	5

Statute Cited

28 U.S.C.	2, 3

Rules Cited

General Order 44	3
Rule 19	2
Rule 19 (1) (b)	2

Other Authorities Cited

Address of Chief Justice Hughes to American Law Institute (May 10, 1934)	5
Address of Chief Justice Vinson to American Bar Association (September 7, 1949)	6

IN THE

Supreme Court of the United States

OCTOBER TERM—1968

No. 1503

SAMUEL S. STARR, MEYER WEINBERG and EDWIN FRADKIN,

Petitioners,

vs.

HYDROCARBON CHEMICALS, INC., and its subsidiaries; BERKELEY SHORE ESTATES, HYSPEC CONTAINER CORPORATION, BURLINGTON DEVELOPMENT COMPANY, INC., HYDROCARBON REALTY DEVELOPMENT CO., INC., LANOKA INVESTMENT CORP., LANOKA HARBOR LAND COMPANY, INC., all New Jersey corporations,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Counter-Statement of the Case

For the purposes of the petition, the petitioner's Statement of the Case (Brief, p. 4-5) may be deemed to be complete and accurate, with the single exception of one factual omission. This omission is the fact that petition-

ers initially looked to Robert Friedlander, Esq., attorney for the debtor, and *not* to the estate for compensation (5a). In fact, petitioners presented Friedlander with their bill for services (5a). Furthermore, only one petition for allowances was submitted by Friedlander on behalf of himself, petitioners and another privately retained attorney (2a). It is clear, therefore, that petitioners looked to Friedlander as the source of their compensation.

ARGUMENT

The reasons set forth in the Petition for Writ of Certiorari are insufficient to justify granting the writ.

Petitioners have set forth four reasons for granting the writ at pages 5-9 of their brief. A close examination of petitioners' argument indicates that none of the reasons is within the scope of Rule 19 (1) (b) of the Supreme Court Rules (U. S. Sup. Ct. Rule 19, 28 U.S.C.). These reasons are treated herein in the order set forth in the petition.

(1) Petitioners allege a conflict between the District Court and the Circuit Court in the instant case. It is clear from the history of this matter that judicial minds have differed on the result that should be reached. But the present posture of this case is an affirmance by the Circuit Court of the result reached by the District Court. The fact that certain judges who heard the case were not in accord with the majority opinion is not a stated reason for granting the petition under Rule 19 (1) (b).

There is no allegation by petitioners that the Third Circuit, in the instant case, ". . . has rendered a decision in conflict with the decision of another court of appeals on the same matter . . ." Rule 19 (1) (b), *supra*. Re-

search by respondent has failed to locate any Circuit Court of Appeals case in conflict with the decision herein.

(2) Petitioners allege that the decision below modifies, or departs from, the language of General Order 44, 28 U.S.C. The argument states that General Order 44 does not apply to an attorney for a debtor not in possession.

It is clear from a reading of the majority and concurring opinions that careful consideration was given to the scope, spirit and letter of General Order 44. The majority opinion found that petitioners ". . . were, in effect, operating under General Order 44 . . ." (5a). Circuit Judge Seitz, concurring, found that ". . . . the appellants necessarily performed the alleged services for the benefit of the receivership estate and not for the debtor out of possession. General Order 44 requires, *inter alia*, court appointment of attorneys who do work for the receiver . . ." (10a). Judge Seitz found that lack of court authorization precluded compensation. Circuit Judge Freedman, concurring, found that the policy underlying General Order 44 and its "prophylactic purpose" would be subverted by allowing fees to petitioners.

Thus it appears that General Order 44 was carefully examined and, while the strict letter thereof may not mandate the denial of compensation to an attorney for a debtor not in possession, the spirit and purpose of the Order were properly found to be a bar herein. This decision is not a modification or departure from General Order 44 but rather a logical, consistent construction thereof.

(3) Petitioners state that no case has been found requiring court approval of an attorney for a debtor not in possession, and that courts have allowed fees to such attorneys. This is not disputed, nor is it contradictory to the majority opinion below. Petitioners, however, were not

the typical attorney for the debtor but rather were special tax counsel retained by the attorney for the debtor without court permission to render services that were within the scope of the duties of the Chapter XI Receiver, and subsequently the Chapter X Trustee. Moreover, the fact that a debtor's attorney may be compensated in some cases is in no way contradictory to the discretionary denial of compensation herein to special assistant counsel. This is especially true in light of the fact that petitioners herein looked to Robert Friedlander, Esq., the attorney for the debtor for their compensation and even submitted their bill directly to him (4a).

The case cited by petitioner is not in conflict with the decision in the instant case. In *Milbank, Tweed & Hope* v. *McCue*, 111 F. 2d 100 (4 Cir. 1940), the attorney for the debtor had rendered services in connection with the proposed plan of reorganization. The court allowed a fee. As stated above, the discretionary allowance of a fee in such a case is wholly proper. But this cannot be taken to be an approval of allowances to special counsel in the status of petitioners. To the contrary, the *Milbank* court stated (at p. 101):

> "Mere participation in a reorganization proceeding does not create a right to compensation. The spirit of the Bankruptcy Act requires economy of administration and forbids the duplication of compensation for the same services rendered by different parties . . ."

Petitioners conclude that the denial of fees to themselves in the instant case raises an important question of federal law which has not been, but should be, settled by this Court. It is submitted that the dispute herein is predominantly personal, *i.e.*, it involves matters of importance to the litigants rather than to the bar or public.

The "important" question postured by the petition involves the employment and compensation of supplemental counsel to a debtor in a Chapter X or XI proceeding. The paucity of cases on the subject noted in the petition and opinions attests to the relative obscurity of the problem and indicates that this case does not present a bankruptcy problem of widespread interest or broad application. It may further indicate that diligent counsel have obtained appropriate orders from the court in like cases, thus preventing the problem from ever arising. In such situations this Court has indicated that the petition should be denied.

In *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955) this court said:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Informal statements by members of this court are consistent with this reasoning:

> "It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered." Address of Chief Justice Hughes to American Law Institute, May 10, 1934, cited with approval in *Rice* v. *Sioux City Cemetery*, *supra*.
>
> "To remain effective, the Supreme Court must continue to decide only those cases which present ques-

> tions whose resolution will have immediate importance far beyond the particular facts and parties involved . . . A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court." Address of Chief Justice Vinson to American Bar Association, September 7, 1949, also cited with approval in *Rice, supra.*

It is submitted that no vital, special or important reason for reviewing this matter has been set forth in the petition.

(4) Petitioners contend that the result reached by the Circuit Court in the instant case prevents a debtor in a Chapter XI proceeding from utilizing its own attorney in evolving a plan of arrangement. This is a tortured and erroneous reading of the Circuit Court's opinion and has no relation to the status of petitioners in the instant case. Court approval is not required for the retention of the attorney for the debtor. And that attorney may receive compensation out of the estate if his services in fact benefit the estate. Such services may include the evolution, promotion and consummation of a plan of arrangement. Nothing in the Circuit Court opinion contravenes these principles.

But petitioners are not the attorneys for the debtor. They were special tax counsel retained, not by the debtor, but by the debtor's attorney (3a-4a). Moreover, they were not retained to aid in furthering a plan, but rather to perform functions "clearly among the duties of the receiver . . ." (8a). And, in fact, no successful plan of arrangement was effected in this case, so that future debtor's counsel could hardly be discouraged from endeavoring to effectuate a plan because of the holding in the instant

case. The argument that the result in the instant case destroys the initiative of Chapter XI debtor's attorneys, contrary to public policy, is without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CRUMMY, GIBBONS & O'NEIL,
Attorneys for Respondent, Elliott I. Clemence, Trustee,
By: MICHAEL R. GRIFFINGER.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 9 1969
JOHN F. DAVIS, CLERK

Nos. 165 & 217

In the Supreme Court of the United States

OCTOBER TERM, 1969

LEO NEWBURGER, PETITIONER

v.

HYDROCARBON CHEMICALS, INC., ET AL.

SAMUEL S. STEIN, ET AL., PETITIONERS

v.

HYDROCARBON CHEMICALS, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

ERWIN N. GRISWOLD
Solicitor General,
Department of Justice,
Washington, D.C. 20530

RAY A. LOCHER, JR.
General Counsel,
DAVID J. BERGER,
Attorney,
PAUL GONSON,
Assistant General Counsel,
ROBERT B. SAKER,
Attorney,
Securities and Exchange Commission,
Washington, D.C. 20549